UNITED STATES DISTRICT COURT

DISTRICT OF MAINE

BRUNSWICK SCHOOL DEPARTMENT,	***)***	
	)	
Plaintiff	***)***	
	)	
v.	***)***	***Docket No. 99-114-P-DMC***
	)	
PAUL and DONNA VERHOEVEN,	***)***	
	)	
Defendants	***)***	

MEMORANDUM DECISION ON PLAINTIFF'S MOTION FOR SUMMARY JUDGMENT[1]

The plaintiff, the Brunswick (Maine) School Department, moves for summary judgment in this action arising out of the denial by a special education due process hearing officer provided by the Maine Department of Education of its March 18, 1999 request for a due process hearing concerning the individualized education plan ("IEP") developed for the defendants' son, P. J. Verhoeven, for the 1998-1999 school year. I deny the motion.

I. Summary Judgment Standard

Summary judgment is appropriate only if "the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no

[1]Pursuant to 28 U.S.C. § 636(c), the parties have consented to have United States Magistrate Judge David M. Cohen conduct all proceedings in this case, including trial, and to order entry of judgment.

genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." Fed. R. Civ. P. 56(c). "In this regard, 'material' means that a contested fact has the potential to change the outcome of the suit under the governing law if the dispute is resolved favorably to the nonmovant. By like token, 'genuine' means that 'the evidence about the fact is such that a reasonable jury could resolve the point in favor of the nonmoving party . . . .'" *McCarthy v. Northwest Airlines, Inc.*, 56 F.3d 313, 315 (1st Cir. 1995) (citations omitted). The party moving for summary judgment must demonstrate an absence of evidence to support the nonmoving party's case. *Celotex Corp. v. Catrett*, 477 U.S. 317, 325 (1986). In determining whether this burden is met, the court must view the record in the light most favorable to the nonmoving party and give that party the benefit of all reasonable inferences in its favor. *Cadle Co. v. Hayes*, 116 F.3d 957, 959 (1st Cir. 1997). Once the moving party has made a preliminary showing that no genuine issue of material fact exists, "the nonmovant must contradict the showing by pointing to specific facts demonstrating that there is, indeed, a trialworthy issue." *National Amusements, Inc. v. Town of Dedham*, 43 F.3d 731, 735 (1st Cir. 1995) (citing *Celotex*, 477 U.S. at 324); Fed. R. Civ. P. 56(e). "This is especially true in respect to claims or issues on which the nonmovant bears the burden of proof." *International Ass'n of Machinists & Aerospace Workers v. Winship Green Nursing Ctr.*, 103 F.3d 196, 200 (1st Cir. 1996) (citations omitted).

II. Factual Background

The defendants reside in Brunswick, Maine with their son P.J., a ninth-grade student for the school year 1998-1999 who has been identified as a student with a disability under the Individuals with Disabilities Education Act, 20 U.S.C. § 1400 *et seq.*, and under Maine's special education

statutes and regulations. Complaint (Docket No. 1) ¶¶ 4-5; Answer (Docket No. 3) ¶¶ 4-5. During the school year 1997-1998 P.J. attended school at the Southern Maine Learning Center pursuant to an agreement between the plaintiff and the defendants. Affidavit of Carolyn Crowell ("Crowell Aff.") (Docket No. 7) ¶ 3. On June 1, 1998 the pupil evaluation team ("PET") for P.J. convened to develop an IEP for P.J. for the 1998-1999 school year. *Id*. ¶ 4.

On June 1, 1998 the PET, over the defendants' objection, decided to place P.J. in a freshman transition program conducted in a self-contained room at Brunswick High School for the 1998-1999 school year. Declaration of Donna Verhoeven ("Verhoeven Aff.") (Docket No. 11) ¶ 3. The defendants requested a due process hearing concerning the IEP that resulted from the June 1, 1998 PET, and a hearing was held before a due process hearing officer on September 8 and 9, 1998. Crowell Aff. ¶¶ 5-6. On September 19, and October 1, 1998 the hearing officer issued written decisions. *Id*. ¶ 6 & Exhs. A & B.

On or about November 17, 1998 another PET meeting was convened at which the June 1 IEP was revised based on additional information that was made available at that meeting. Crowell Aff. ¶ 8. After this meeting, P.J. began to attend Brunswick High School. *Id*. ¶9. On November 23, 1998 the defendants filed an appeal from the hearing officer's decision which is presently pending in this court as *Paul Verhoeven, et al. v. Brunswick Sch. Comm.*, Docket No. 98-400-P-DMC. Complaint ¶ 12; Answer ¶ 12.

In December 1998 or January 1999 P.J. began to have difficulties, including difficulty completing his school work. Crowell Aff. ¶ 11; Verhoeven Aff. ¶¶ 5-6. As a result, P.J.'s PET, with the participation and agreement of Donna Verhoeven, decided to order a psychological evaluation of P.J. and to develop a behavior plan for him. Crowell Aff. ¶ 11; Verhoeven Aff. ¶ 6. At a PET

meeting on March 3, 1999 Donna Verhoeven announced the "family's" decision to withdraw P.J. from Brunswick High School and to provide him with home schooling. Verhoeven Aff. ¶ 7; Crowell Aff. ¶ 13. Donna Verhoeven stated at this time that she was dissatisfied with P.J.'s placement at Brunswick High School and that she was concerned that the high school's program was not appropriate to meet P.J.'s educational needs. Verhoeven Aff. ¶ 7.

On March 11, 1999 the plaintiff requested mediation from the Maine Department of Human Services in this matter. Exh. C to Crowell Aff. No mediation session was held. Verhoeven Aff. ¶ 8. On March 18, 1999 the plaintiff filed a request for a due process hearing, seeking a ruling that P.J.'s IEP, as revised through March 1999 and specifically including the behavior plan developed in March 1999, and P.J.'s placement at Brunswick High School were reasonably calculated to provide P.J. with education in the least restrictive environment. Exh. D to Crowell Aff. & Exh. B thereto. The defendants asked the hearing officer to dismiss the hearing request. Crowell Aff. ¶ 19 & Exh. E at [1]. After considering written arguments submitted by the parties and oral argument, the hearing officer dismissed the hearing proceeding on April 5, 1999. Exh. E to Crowell Aff. at [1], 4. The plaintiff filed the instant appeal from that decision on April 9, 1999. Docket.

III. Discussion

The plaintiff contends that the hearing officer exceeded her authority in dismissing its hearing request and that the hearing officer's decision was wrong on the merits.[2] The hearing officer held

[2] The plaintiff also argues that it has a statutory right to request a due process hearing. Plaintiff's Motion for Summary Judgment and Incorporated Memorandum of Law ("Motion") (Docket No. 5) at 6-8. The defendants do not dispute this point. The Verhoevens' Objections to Brunswick's Motions for Summary Judgment and for Consolidation, etc. ("Defendants' Memorandum") (Docket No. 9) at 5-7.

that, while no statute or regulation specifically permits a special education hearing officer to dismiss a hearing request, no statute or regulation bars a hearing officer from doing so, and the matter thus is one within the hearing officer's discretion. Action on Request to Dismiss Hearing, Brunswick v. Verhoeven, Case 99.061 ("Hearing Officer's Decision") (copy attached to Complaint) at 3. On the merits, the hearing officer found that the plaintiff's request did not raise a new dispute for hearing; that is, "this is essentially the same dispute" as that adjudicated by the hearing officer in September 1998 and before this court on appeal in Docket No. 98-400-P-DMC. *Id*. Under these circumstances, the hearing officer concluded, no practical purpose would be served by another administrative hearing. *Id*. at 3-4.

The plaintiff argues, in summary fashion, that the hearing officer had no authority to dismiss the hearing request. Motion at 15. The only case law cited in support of this argument is a 1995 decision of an Illinois hearing officer, *Effingham Community Unit Sch. Dist. No. 40*, 23 IDELR 276 (III. Aug. 9, 1995), Exh. 2 to Motion, whose decision on the point, *id*. at 277, is based on *W.F. Smith & Co. v. Rosewell,* 463 N.E.2d 1024 (Ill. App. 1984), a decision interpreting state tax law that even at the time it was cited by the hearing officer had been effectively overruled, *Kousins v. Anderson*, 593 N.E.2d 1095, 1097-98 (Ill. App. 1992). I find the Illinois hearing officer's one-sentence treatment of this question less than persuasive. Adopting the plaintiff's argument would mean that a hearing officer could never decline to hold a hearing once requested by a parent or a school, no matter how repetitive, frivolous, or otherwise inappropriate the request. I find nothing in the governing statutes or regulations that can reasonably be interpreted to require this result. The hearing

officer was not without authority to dismiss the hearing request.[3]

On the merits, the plaintiff contends that its hearing request concerned a new dispute between the parties, rather than an escalation of the existing dispute, as the hearing officer found. The plaintiff bases this contention on the different time periods addressed by the initial hearing and its request, the appropriateness of a new behavior plan developed for P.J. at the March 1999 PET, the implementation of the November 1998 IEP, and the parties' disagreement over who should perform a psychological evaluation of P.J. ordered by the March 1999 PET. Motion at 9-10. The psychological evaluation has taken place, Verhoeven Aff. ¶ 9, so there can be no issue in that regard for resolution by a hearing officer.[4] I find nothing in the governing statutes and regulations, and the plaintiff cites no authority, to support the contention that implementation of an IEP presents an issue for a due process hearing. 20 U.S.C. § 1415(f) (due process hearings must be available for certain parental complaints); 34 C.F.R. §§ 300.504(a), 300.506(a); Special Education Regulations, Chapter 101, Maine Department of Education (February 1996) ("Maine Regulations"), §§ 10.7, 11.1 (parent or school unit may initiate due process hearing when parent takes certain actions). Indeed, a hearing on the implementation of an approved IEP, without any of the changes specified in the governing regulations, could only duplicate the effect undertaken at a hearing on the appropriateness of the IEP in the first place.

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[3] My conclusion that the hearing officer could dismiss a hearing request necessarily means that the plaintiff's claimed "right" to a decision within 45 days after its request, 34 C.F.R. §300.512(a), Motion at 14-15, was not violated. Only if the act of making the request entitles the requesting party to a hearing under any and all circumstances could the dismissal of the request also violate this regulation.

[4] In addition, this issue was not raised in the plaintiff's request for a due process hearing. Exh. D to Crowell Aff. Accordingly, there is a real question whether the requested hearing could have addressed this issue in any event.

With respect to the January 1999 decision to develop a behavior plan, the evidence before the court conflicts on the question whether the parents disagreed about the appropriateness of that plan. The plaintiff contends that Donna Verhoeven "made it clear that she did not agree with the behavior plan being developed," Crowell Aff. ¶ 13, but the defendants respond that they "participated fully and positively in all efforts to assist P.J. at Brunswick High School . . . , including the development of a behavior plan . . .," Verhoeven Aff. ¶ 6. This dispute is not one concerning a material fact that would prevent the entry of summary judgment, however, because the hearing officer's conclusion that the behavior plan, for all that appears in the record, was a "relatively minor" change in the IEP and an "attempt[] to accommodate the student's return to the public school," Hearing Officer's Decision at 3 n.4, is correct.

The plaintiff does not indicate whether it contends that the behavior plan was a change in "the identification, evaluation or educational placement or the provision of a free appropriate public education" to P.J., the only possible grounds for a hearing set forth in the governing regulations. Maine Regulations § 10.7(A); 34 C.F.R. §300.504(a)(1). It is clear that the behavior plan did not represent a change in the identification of P.J. as a student for whom an IEP was required, that it did not change his educational placement, and that it did not change the fact that the plaintiff was providing a free public education to P.J. Nor does the behavior plan represent a change in the evaluation of P.J., as that term is defined at page 75 of the Maine Regulations and 34 C.F.R. §§ 300.530-300.534. The question whether the education provided to P.J. under the November IEP was "appropriate" had already been the subject of a hearing, and the record simply does not establish that the behavior plan alone constituted a change in the IEP that rendered the education provided to P.J. by the plaintiff inappropriate from his parents' point of view.

It is for this reason as well that the mere fact that the plaintiff's request for a hearing "cover[ed] a different time period," Motion at 11, than that addressed by the initial hearing does not entitle the plaintiff to a new hearing. The fact that time has passed does not in itself make an IEP more or less appropriate for the student. The passage of time, standing alone, cannot constitute a change in any of the elements set forth in the state and federal regulations governing due process hearings.

None of the case law cited by the plaintiff supports a different outcome here. In *Urban v. Jefferson County Sch. Dist. R-1*, 89 F.3d 720, 724-25 (10th Cir. 1996), the student was required to exhaust his administrative remedies with respect to a second IEP, clearly distinct and independent from the first IEP, before joining claims concerning the second IEP with claims concerning the first in a single court action. There is no IEP at issue here other than the November 1998 IEP. Nothing in the denial of the plaintiff's hearing request prevents it from undertaking preparation of a new IEP for P.J. for the 1999-2000 school year. While it may make sense as a practical matter to await the outcome of Docket No. 98-400-P-DMC, the appeal concerning the 1998-1999 IEP, before attempting to develop an IEP for the next school year, that fact is unaffected by the request for a second administrative hearing concerning the 1998-1999 IEP. The excerpt from the decision in *Town of Burlington v. Department of Educ. of Massachusetts*, 736 F.2d 773, 794 (1st Cir. 1984), quoted by the plaintiff makes this clear; it certainly does not support an argument that denial of a second hearing on an existing IEP bars the development of a new IEP. Finally, to the extent that *Murphy v. Timberlane Reg'l Sch. Dist.*, 22 F.3d 1186 (1st Cir. 1994), may be interpreted to require a school district to request a due process hearing under the circumstances present in this case, the plaintiff has done so. In fact, the decision in *Murphy* was based on a specific New Hampshire

regulation, *id*. at 1195-96, which appears to have no counterpart in Maine law; accordingly, it is doubtful whether *Murphy* has any application to IEPs developed in Maine.

IV. Conclusion

For the foregoing reasons, the plaintiff's motion for summary judgment is **DENIED**. From all that appears in the record, it seems appropriate for the court to enter summary judgment *sua sponte* in favor of the defendants in this case. *See Rogan v. Menino*, 175 F.3d 75, 1999 WL 244124 (1st Cir. Apr. 29, 1999), at *3. The plaintiff shall, by a filing made on or before June 28, 1999, show cause why the court should not do so in this case in which the plaintiff requested, and the court has granted, expedited treatment. Motion for Expedited Treatment and Incorporated Memorandum of Law (Docket No. 2) and endorsement thereon dated May 17, 1999.

Dated this 18th day of June, 1999.

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David M. Cohen
United States Magistrate Judge